IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 720 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : YES

HEIRS OF BHIL KANJI BHAGWAN LAXMIBEN KANJI

Versus

BHIL KARSAN BIJAL

Appearance:

1. Civil Revision Application No. 720 of 1979

MR SURESH M SHAH for Petitioner No. 1-3

MR PV HATHI with MR DK MEHTA for Respondent No. 1,3-4

RULE SERVED for Respondent No. 1/1-1/9

DELETED for Respondent No. 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision:7/08/2003

C.A.V. JUDGEMENT

1. Bhil Kanji Bhagwan, petitioner - original defendant since deceased through his heirs and legal representatives have filed this Civil Revision Application under Section 29 of the Bombay Rent Act, challenging the judgment and decree dated 30th April, 1979, passed by the learned District Judge, Rajkot, in Civil Appeal No.109 of 1978. The learned Judge by his

impugned judgment was pleased to allow the appeal and was pleased to quash and set aside the judgment and decree dated 31st August, 1978, passed by the learned Jt.Civil Judge(J.D.), Rajkot, in Regular Civil Suit No.886 of 1975 filed by original plaintiff Karsan Bijal and others respondents herein.

2. The facts giving rise to this Civil Revision Application are as under:

2.1 Karsan Bijal and others - plaintiffs (respondent No.1 in the petition since deceased through his legal heirs and representatives) had given the suit premises situated at Juna Bhilwas, Sheri No.7, Near Jansatta Press at Rajkot (hereinafter referred to as `the suit premises') on lease to the defendant Kanji Bhagwan (since died during the pendency of the proceedings now through his legal heirs and representatives) for monthly rent at Rs.9.00/-.

2.2 It is a case of the plaintiff that plaintiff No.1 is the owner and rent collector of the suit premises. As the defendant had paid the rent only upto 31st December, 1970, and thereafter from 1.1.1971 the defendant failed and neglect to make the payment of rent, the plaintiffs were constrained to address a notice to the defendant dated 16.9.74 (Exh.21). In the said notice it was alleged that the defendant has not paid the rent from 1.1.1971 to 31.8.1974 i.e. for 44 months for which he has not paid the rent of Rs.396/-. The defendant did not reply to the said notice and ultimately the plaintiff Bhil Karsan Bijal filed a suit on 1st September, 1975, on the ground of the arrears of rent and acquiring the suitable premises at Jamnagar.

2.3 The plaintiffs - respondents herein filed a suit against the defendant on the ground of non-user of the premises also. In the said suit also the plaintiffs claimed rent from 1.1.1971 to 31.10.1974 for total 46 months amounting to total Rs.414/-, mesne profits since 1.11.74 to 31.7.75 for 9 months i.e. Rs.81/-. In all Rs.510/- claimed by the plaintiff.

2.4 The defendant replied to the said suit by filing written statement at Exh.9. In the said written statement it was stated that originally the defendant occupying the suit premises since 1954 and at that time the monthly rent was Rs.7/- and thereafter the monthly rent was increased to Rs.9/-. The defendant stated that he was ready and willing to pay the rent but the plaintiffs have not accepted the same. The said written

statement was filed on 15th January, 1976.

2.4(A) Thereafter the learned trial Judge has framed the following issues:

(1) Whether the plaintiffs prove that the defendant is in arrears of rent for six months or more and that he has neglected or refused to pay the same within one month of receipt of suit notice?

(2) What is the standard rent of the suit premises?

(3) What is due and whether any part of it is time barred?

(4) Whether the suit notice is legal and valid?

(5) Whether the defendant has acquired or been allotted?

(6) Whether the suit is bad for non-joinder of necessary parties?

(7) Whether the plaintiffs are entitled to eviction decree?

(8) Whether the plaintiffs are entitled to running mesne profits?

(9) What order and decree?

2.5 Before the trial court, the plaintiff examined himself namely Shri Karsan Bijal at Exh.15. In his evidence he has stated that his father had died and from that onwards he is the owner of the premises. the defendants are the tenants of the suit premises at the monthly rent of Rs.9/- p.m. Initially his father was collecting the rent and after the death of his father he is collecting the rent. The plaintiff has stated that defendant has paid the rent upto 31st December 1970, thereafter he has not paid the rent. In this behalf he has also addressed a notice to the defendant.

2.6 On behalf of the plaintiffs, the plaintiffs have produced the following documentary evidence:

(1) Heirship Certificate dated 26.12.77 at Exh.16.

(2) Counter Foil of rent receipt dated 8.1.71 at Exh.17.

(3) Counter Foil of rent receipt dated 2.11.70 at Exh.18.

(4) Counter Foil of rent receipt dated 12.11.70 at Exh.19.

(5) Postal A.D. receipt dated 18.9.74 at Exh.20.

(6) Suit notice dated 16.9.74 at Exh.21 and

(7) Empty envelope at Exh.22.

2.7 On behalf of the defendant, the defendant has not produced any documentary evidence. However, he has relied upon the oral evidence namely:

(1) The first witness Shri Kanjibhai Bhagwandas at Exh.26, who is the defendant in the suit. He has stated that he is residing in the premises since September 1954 and rent is Rs.9/-p.m. He has admitted that he has paid the rent upto March 1971 and thereafter he has paid the rent before the trial court.

(2) The second witness Shri Maganbhai Bhanjibhai at Exh.30 who is the neighbour of the defendant. He has stated that the defendant is residing in the suit premises.

(3) The third witness Shri Jagdish Kanjibhai at Exh.31. He has stated that his father has received the suit notice in this behalf.

2.8 After considering the evidence on record the learned trial Judge came to the conclusion that original rent of defendant was Rs.7/- p.m. but the defendant requested to arrange for proper covering of roof tiles, by tiler every year and defendant himself offered to pay the rent of Rs.9/p.m. instead of Rs.7/- which the plaintiff accepted and since then the rent was increased to Rs.9/- from Rs.7/p.m. Even defendant in his evidence also stated that previous rent was Rs.7/- p.m. In view of this fact the learned trial Judge held that the original rent of the suit premises was Rs.7/- p.m. However, so far as house tax and education cess is concerned, the plaintiff has not deposed anything. The

learned trial Judge has also held that the the liability of house tax is not on tenant. However, the law imposes the liability upon either landlord or tenant, as the case may be, so far as the education cess is concerned, as per Sec.19 of the Gujarat Education Cess Act 1962, in absence of any contract to contrary, prior to 1.4.70 the full education cess was leviable from occupier i.e. the tenant, and after 1.4.70 half from landlord and half from the tenant. The learned trial Judge has held that the defendant is liable to pay half the leviable education cess and has fixed the standard rent of the suit premises Rs.7/- p.m. exclusive of half leviable education cess.

2.9 After considering evidence on record the learned trial Judge held that the rent was due from 1.1.1971 and it was due upto 31.8.1974. As the notice was duly served and yet the rent was not paid at all the learned trial Judge held that the plaintiffs prove that the defendant is in arrears of rent for six months or more after receipt of the suit notice and that defendant has neglected and refused to pay the same within one month of receipt of suit notice. The learned trial Judge further held that the statutory obligation of the defendant to pay due rent starts since the standard rent is fixed and in view of the same no part of rent is time barred in this behalf. The learned trial Judge has also held that amount of Rs.500/- are due and payable by the tenant to the landlord. The learned trial Judge has further held that the suit notice is legal and valid.

2.10 As regards acquiring suitable premises, the plaintiffs did not press the said issue and therefore the learned trial Judge has not decided the said issue. In view of the provisions of education cess and in view of the fact that the standard rent was fixed by the learned trial Judge in that very judgment, the learned trial Judge has held that the defendant is entitled to protection under Section 12(3)(b) of the Bombay Rent Act and plaintiffs were not entitled to eviction decree in this behalf.

2.11 As regards issue no.8 mesne profit it does not survive. As regards issue no.9 that suit of the plaintiff was partly allowed and partly dismissed namely suit for eviction decree is dismissed with costs. However the defendant to pay to the plaintiff a sum of Rs.500/with proportionate costs. The standard rent of the suit premises fixed at Rs.7/- exclusive of half leviable education cess.

2.12 Being aggrieved and dissatisfied with the said

judgment and decree of the learned trial Judge, the original plaintiffs-landlord filed Civil Appeal No.109 of 1978 before the District Court at Rajkot on 28th September, 1978. In the appeal also notice was issued and ultimately matter was heard by the learned Judge. The learned Judge heard the arguments of both the sides and raised following points for determination:

(1) Whether the learned trial Judge erred in dismissing the suit for possession?

(2) What order?

2.13 The learned Judge thereafter considered the entire evidence on record and also provisions of education cess particularly Section 12(1)(a) of the Act. The learned Judge considered that as the standard rent Rs.7/- per month, the annual letting value of the suit premises would be Rs.84/-. He has stated that as per the provisions of the Education Cess Act, the education cess is required to be paid only if the annual letting value is more than Rs.100/- per annum. As in this case the annual letting value is only Rs.84/- which is less than Rs.100/-, the education cess is not required to be paid by the defendant in this behalf. The learned Judge held that the education cess is a permitted increase and forms part of the rent and is not payable monthly and therefore in case in which statutory liability of the tenant arises to pay education cess, the provisions of sec.12(3)(b) of the Bombay Rent Act are applicable. Even there is no evidence on record to show that original plaintiff had ever paid education cess for the suit premises, nor there was any contention for that and therefore the question of payment of education cess by plaintiff did not arise and, therefore, the provisions of Section 12(3)(a) are applicable as the rent is payable by month and rent was due for more than six months on the day of the notice, no dispute about standard rent was raised within one month from service of notice and legal notice terminating the tenancy was served. In view of the same, the learned Judge held that the learned trial Judge has, therefore, erred in holding that provisions of Section 12(3)(b) of the Bombay Rent Act are applicable. The learned Judge held that in this case the notice was given by the plaintiff for terminating the tenancy and dispute about the standard rent was not raised within the period of one month from the date of service of notice. As the defendant did not raise the said issue and therefore provisions of Section 12(3)(a) are applicable. The learned Judge also held that the amount of rent was not paid within one month from the date of service of the

notice and therefore the tenant is liable to be evicted. In view of the same, the learned Judge was pleased to allow the appeal and was pleased to quash and set aside the judgment and decree of the trial court and directed to the respondent to hand over possession of the suit premises and further directed to the respondent to pay entire costs of the suit and bear his own costs.

3. Mr.S.M.Shah, learned counsel for the petitioner has invited my attention to the provisions of Order 41 Rule 31 of the Civil Procedure Code which provides as under:

"Order 41 Appeals from Original Decrees : Rule 31. Contents, date and signature of judgment :- The judgment of the Appellate Court shall be in writing and shall state -

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

3.1 Thereafter he has invited my attention to the issues framed by the trial court and points for determination prepared by the Appellate Court. He, therefore, submitted that as the learned appellate Judge has not properly framed points for determination and only framed one issue and therefore the entire judgment of the appellate court is bad in law.

3.2 In support of the aforesaid submission, he has relied on the following contentions. First of all he submitted that the provisions of CPC are applicable to the rent act provisions and in support of the said submission he has relied on the Full Bench Judgment of this Court in the case of Prabhashankar Shankarlal Joshi and others Vs. Fulsinhji Kesharisinhji Parmar reported in 1984 GLH 662 particularly para 12 of the said judgment.

3.3 The learned advocate for the petitioner has

relied upon judgment of the Bombay High Court in the case of Mhasu Bhauji Vs. Davalat Narayan and others reported in (1904) 7 Bombay Law Reporter 174. In that case if one closely examined the facts of the case it appears that the Bombay High Court has observed "dealing now with the finding of the District Judge on the issue, no doubt it appears at first sight a finding of fact because he holds on the strength of circumstances disclosed, in his opinion, by the evidence that defendant No.3 has been in adverse possession to as to extinguish the plaintiff's right as a mortgagee of defendant No.1. But the question of adverse possession is sometimes a mixed question of law and fact, and that it is so here, the District Judge's grounds for his findings are enough to show. He finds that the land has been held by Sampat, father of defendant No.2, and afterwards by defendant No.3 more than twelve years as owner "to the knowledge and acquiescence of the plaintiff." If by this is meant that the plaintiff stood by and encouraged Sampat in the belief that the land was not subject to his mortgage, there must be some evidence to show that. The District Judge does not refer to that, and the question of acquiescene is one of law. If, on the other hand, the District Judge meant that the plaintiff did nothing to assert his mortgage, then the question is - Did defendant No.3 repudiate the mortgage? That question is important in view of the District Judge's finding that defendant No.3 had notice of the plaintiff's mortgage. We think we must ask the District Judge to raise a distinct issue on the question of adverse possession and record a fresh finding as the present finding does not show that the District Judge clearly appreciated the law as to adverse possession applicable to such cases.

3.3(A) In view of the aforesaid observations, the Bombay High Court held that the issue raised by the learned District Judge was a very vague and general terms in which the District Judge has raised it in the present case and, therefore, the case was remanded back to the learned District Judge in this behalf. In that context the Bombay High Court observed that the appellate court to raise points for determination, is to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions of the latter.

3.4 Learned counsel for the appellant has relied on the judgment of the Bombay High Court in the case of Smt.Anita M.Harretto vs. Abdul Wahid Sanaullah reported in AIR 1985 Bombay 98. In that case the Bombay High Court has stated the facts in para 16 and thereafter what

are the requirements of Order 41 Rule 31 of the CPC and after relying upon the decision of Bombay High Court in the case of Mhasu v. Davalat reported in (1905) 7 Bom.LR 174 the Court observed as under:

> "The points which must arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. It is a matter of almost textbook knowledge that the exact questions which arise in the appeal and require determination must be stated in the judgment. "It is not sufficient to state the point to be determined in appeal whether or not the decision is consistent with the merits of the case." The point so stated is hardly a point for determination as contemplated in Order 41 Rule 31 of the Code."

3.5 He has also relied on the judgment of this Court in the case of Ismail Haji Mohammed Abrahani and Another Vs. The State of Bombay (Now Gujarat) reported in 7 GLR 208.

3.6 It may be noted that in that case i.e. Ismail Haji Mohammed Abrahani (supra), the learned District Judge under Order 41 Rule 11 was pleased to pass the following order:

> "Heard L.A. Shri Virani; Summarily dismissed under Order 41 Rule 11(1) Civil Procedure Code. L.A. Virani has argued all points raised in memo of appeal. 7th November 1958."

3.7 In that context the learned Judge in that case relied upon Rule 410 of Civil Manual on page 210 which reads as under:

> "Rule 410 :- When an appeal is dismissed summarily under Order XLI, rule 11 of the Civil Procedure Code, the Court shall record a brief judgment, stating the reasons for dismissal. A formal decree should also be drawn up in such a case."

3.8 In view of the same, it was held in Ismail case (supra) that the High Court has the authority under its powers of superintendence to make rules to be followed by the subordinate judiciary to ensure dispensation of justice in accordance with acknowledged principles of law and natural justice. The subordinate court is bound by such rules unless, as stated above, it is in direct

conflict with any statutory provision or any rule made thereunder and in view of the same this Court ultimately allowed the second appeal filed by the appellant in this behalf.

3.8(A) Learned advocate for the petitioner stated that in judgment of Ismail case (supra) the court relied upon Rule 410 of Civil Manual and interpreted the said rule in that context. He has stated that now we have in Civil Manual Rule 414. As per the said rule the power and duties of the appellate court have been mentioned. He submitted that in view of Rule 414 of Civil Manual is concerned, this Court also considered Ismail's case (supra) and state that in this case the learned appellate Judge has not properly considered the facts of the case. Rule 414 of the Civil Manual is reads as follows:

> "Rule 414 The appellate court should frame suitable points for determination in appeals in accordance with the same principles on which issues are framed in the trial court."

3.9 Learned counsel has also relied on the recent judgment of the Apex Court in the case of Madhukar and others Vs. Sangram and others reported in AIR 2001 SC 2171 in para 8 on page 2172 it has been observed as under:

> "Our careful perusal of the judgment in the first appeal shows that it hopelessly fails short of considerations which are expected from the Court of first appeal. We, accordingly, set aside the impugned judgment and decree of the High Court and remand the first appeal to the High Court for its fresh disposal in accordance with law."

4. Mr.P.V.Hathi, learned advocate with Mr.D.K.Mehta, learned advocate for the respondents has invited my attention to the facts of the case particularly judgment of the trial court as well as of the appellate court. He has submitted that the trial court has considered all points but ultimately only one point framed as to whether the plaintiffs are entitled for possession or not. The trial court held that the suit falls within section 12(3)(b) of the Act and, therefore, the plaintiffs are not entitled for the possession whereas the appellate court held that when the standard rent of the suit premises fixed at Rs.7/-p.m. when the provisions of the education cess are not applicable and when the notice was issued and within one month from the service of notice the defendant did not reply to the notice and did not pay

the amount of rent in question, the finding of the appellate court after considering the entire evidence on record came to the conclusion that Section 12(3)(a) applies and for that purpose the learned appellate Judge framed the issue whether the learned trial Judge has erred in dismissing the suit for possession was perfectly justified in framing the issue which cover the entire case of the plaintiff in this behalf.

4.1 Learned advocate for the respondents has submitted that the contention raised by the learned advocate for the applicant is that the appellate court has not framed proper point for determination as contemplated under Order 41 Rule 31 of the Civil Procedure Code and, therefore, the judgment and decree of the appellate court should be set aside and the matter should be remanded for fresh decision to that court. In support of his contention, the learned advocate has relied upon two judgments of the Bombay High Court in the case of Mhasu Bhanji Vs. Davalt Narayan and others reported in 7 BLR page 174 and in the case of Smt. Anita M.Harretto Vs. Abdul Wahid Sanaullah reported in AIR 1985 Bombay p.98.

4.1(A) As against that the learned advocate appearing for the respondents has stated that the appellate Judge has properly raised the point of determination as well as the scope of the appeal before him and otherwise the learned appellate Judge has considered all relevant questions raised by the parties and has reversed the judgment after considering the admitted position of fact and law and therefore it cannot be said that the appellate court has not followed the Order 41 Rule 31(A) of the Code. He further submitted that at the most it can be said to be an irregularity which does not make the decree void or ineffective. He not only distinguished both the judgments of the Bombay High Court but also further relied upon a recent judgment of the Bombay High Court in the case of Hari Sonar Vs. Shri Premraj Harbhagat Lahoti and others reported in 2001 AIHC 1691 particularly para 11 and 12 of the said judgment which reads as under:

"Para 11. As against this position, in the present matter the points for consideration formulated by the learned 6th Additional District Judge read as follows:

"(1) Whether the findings recorded by the trial court on the issues need interference?

(2) What order and costs?"

True, all the issues which were framed by the trial court are not specifically mentioned in this point formulated by the learned 6th Additional District Judge but he has referred to all the issues which are framed by the trial Court and is putting a question before himself that whether the findings recorded by the trial Court on those issues require interference. So that way, this formulation of point cannot be considered as not following the provisions of Order 41, Rule 31 of the Civil Procedure Code. All those issues which arose out of the pleadings before the trial Court are mentioned by this one point. May be, it would have been better if all those issues were reproduced as points for consideration in the appellate judgment. But merely because there is no reproduction of those issues that does not mean that the learned Appellate Judge had ignored the issues which were arising out of the pleadings in the trial Court and which were arising out of the appeal memo and the counter appeal memo before the Appeal Court. So, it cannot be said that the point for determination which is framed in this matter is like the point for determination framed in the above quoted reported ruling.

"para 12. One more circumstances has to be taken into consideration. While giving reasons in the appellate judgment the learned Appellate Judge has discussed each and every issues which was framed by the trial Court by giving separate captions to each issue as per the number shown in the trial Court judgment. May be that he has considered some issues out of sequence but all the issues which were before trial Court are specifically reconsidered by him by putting captions while giving reasonings for the particular issue. So, this is not a case where the learned Appellate Judge has ignored the requirement of Order 41, Rule 31 of the Code of Civil Procedure in spirit."

4.1(B) In the aforesaid judgment, the Bombay High Court held that when the appellate Judge has given reasons after discussing all the material issues, it cannot be said that the learned appellate Judge has ignored the requirement of Order 41 Rule 31 of the CPC.

4.2 He has also relied on the judgment of the Rajasthan High Court in the case of Satya Prakash Vs. Gyarsi alias Gyarsiram reported in 2000 AIHC 4974 para 8 which reads as under:

> "I have examined the judgment given by the learned first appellate Court, in the light of Order 41, Rule 31, CPC, which reveals that the learned first appellate Court has decided the point for determination between the parties, in accordance with law. The learned first appellate Court has consciously re-assessed the testimonial value of the evidence adduced by both the parties, in reference to the points of law involved in first appeal. In this case, the findings recorded by the learned first appellate Court, are based on analytical discussion of the evidence adduced by both the parties. In support of its findings, the learned first appellate Court has given cogent and convincing reasons, with which, I am at one."

4.3 He has also relied on Madras High Court judgment in the case of S.Madasamy Thevar Vs. A.M.Arjuna Raja reported in AIR 2000 Madras p.465 para 43 on page 473 it has been observed as under:

> "When we consider the substantial questions of law framed by this Court, at the time of taking the Second Appeal on file, the first question is in respect of Order 41, rule 31, C.P.C. The said rule deals with content, date and signature of judgment. Order 41, Rule 31(a), C.P.C. deals with the "points for determination". Learned counsel for the appellant has argued that the first appellate Court has not framed the proper points for determination in the appeal whereas the only point framed is omnibus in nature. The only point raised by the first appellate Court is whether the judgment and decree of the trial Court are to be set aside and the appeal to be allowed? It would have been better if the first appellate Court has framed sufficient points for its consideration in the appeal. However, though sufficient points are not framed for determination, the first appellate Court has considered all the relevant questions raised by the parties in the first appeal and also oral and documentary evidence and thereafter has come to the conclusion of reversing the judgment and

decree passed by the trial Court. In such circumstances, as the relevant points are all considered by the first appellate Court, it cannot be said that the said Court has not followed Order 41, Rule 31(a), C.P.C."

4.3(A) After relying upon the aforesaid judgment, he has submitted that all these judgments shows that only substantial compliance of the said provision was necessary and that the judgment cannot be said to have been vitiated in absence of the necessary point for determination and the same can be said to be a mere irregularity.

4.4 He has also relied upon the judgment of the Hon'ble Supreme Court in the case of Jaywant S.Kulkarni and others Vs. Minochar Dosabhai Shroff and others reported in AIR 1988 SC 1817 particularly para 3 on page 1820 the Hon'ble Supreme Court has observed as under:

"The tenant had neglected to make payment until the expiration of the period of one month after month after notice referred to in sub-section (2). The Court was bound to pass a decree for eviction in any such suit for recovery of possession. In terms of this decision of this Court in Harbanslal Jagmohandas (Supra), the eviction order had to follow by operation of law."

4.5 He has also relied on the another judgment in the case of Patel Valmik Himatlal & Ors. Vs. Patel Mohanlal Muljibhai (Dead) through L.rs. reported in JT 1998 Vol.6 SC 59 particularly para 6 on page 61 it has been observed as under:

"The powers under section 29(2) are revisional powers with which the High Court is clothed. It empowers the High Court to correct errors which may make the decision contrary to law and which errors go to to the root of the decision but it does not vest the High Court with the power to re-hear the matter and re-appreciate the evidence. The mere fact that a different view is possible on reappreciation of evidence cannot be a ground for exercise of the revisional jurisdiction."

CONCLUSION:-

5. I have considered the provisions of Section 29 of the Rent Act which provides appeal against the judgment of the trial Court. The said section corresponds to Section 96 of the CPC.

5.1 What is meant by appeal:

The expression "appeal" has not been defined in the Code. According to dictionary meaning, however, "appeal" is an application or petition to a higher authority or a court of law for reconsideration of the decision of a lower authority or an inferior court of law. It is an application or a proceeding for review to be carried out by a higher tribunal of a decision given by a lower one. An appeal is one in which the question is, whether the order of the court from which an appeal is brought was right on the materials which that court had before it.

{Re. C.K.Thakker, Code of Civil Procedure, 1908 Volume 2 page 286}

5.2 In Nagendra Nath v. Suresh Chandra reported in AIR 1932 Privy Council 165 speaking for the Judicial Committee of the Privy Council, Sir Dinshaw Mulla J. stated: (p.167) "There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate court, asking it to set aside or reverse a decision of a subordinate court, is an appeal within the ordinary acceptation of the term."

5.3 What is the essential elements of appeal.

5.3A An appeal includes three basic elements; (i) a decision (usually a judgment of a court or the ruling of an administrative body) from which an appeal is made; (ii) a person or person aggrieved (who is often, though by no means necessarily party to the original proceedings); and (iii) a reviewing body ready and willing to entertain the appeal.

5.3B According to Story (Story on Constitution of United States,Vol.2 Art.1761), the essential criterion of the appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause.

[Para 5.3 A, 5.3B Re. C.K.Thakker, Code of Civil Procedure, Volume II page 287]

5.3C I have considered the definition of sec.2(2) decree which provides as follows:

"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [***] section 144, but shall not include -

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default."

5.3D I have also considered section 2(9) of CPC which provides definition of "judgment". According "judgment" means the statement given by the Judge on the grounds of a decree or order and sec.99 of CPC which provides as under:

"Sec.99 No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction:- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

5.4 I have also considered Section 107 of the CPC which provides powers of appellate court. Sub-sec.(1) of Section 107 reads as under:

"sub-sec.(1) of Sec.107 :- Subject to such conditions and limitations as may be prescribed, an appellate court shall have power -

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken."

5.4(A) "Now a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it."

{Re: The judgment of the Hon'ble Supreme Court in the case of Sangram Singh Vs. Election Tribunal, Kotah and another reported in AIR 1955 SC 425 particularly para 16 on page 428}

5.4(B) "The provisions of R.31 should therefore be reasonably construed and should be held to require the various particulars to be mentioned in the judgment only when the appellant has actually raised certain points for determination by the appellate Court, and not when no such points have been raised as had been the case in the present instance when the appellant did not address the Court at all.

5.4B/i "para.10 The view that we take, also finds support from the object which the Legislature probably had in providing that the judgment must contain the matters mentioned in R.31. The object seems to be that the parties should know for what reasons the decision has gone against them and thereby be in a position to decide whether they should go up in appeal or revision against the judgment. If they do not know the decision and the reasons therefor, they cannot make up their mind and, even if they have no intention to go up in appeal, they may not even be satisfied about the Court considering the matter for determination properly."

{Re: The judgment of the Hon'ble Supreme Court in the case of Thakur Sukhpal Singh Vs. Thakur Kalyan Singh and another reported in AIR 1963 SC 146 particularly para 7 on page 148 and para 10 on page 149}

5.4(C) "In my view, a substantial compliance with the requirements of R.31 O.41 would be sufficient and

any little deviation therefrom should not be a ground to set aside the entire judgment on that account. It is no doubt desirable that the first Appellate Court complies with all the requirements of that Rule, but if it is possible to make out from the very judgment that they have substantially complied with the said requirements and that justice has not thereby suffered that would be sufficient."

{Re: In the case of Assistant Commissioner, Tumkur and others Vs. K.N.Nagaraja reported in AIR 1983 Karnataka 111 para 9 on page 113}

5.4(D) In this case the trial court has raised all issues and determined the same. The appellate court has stated the points for determination, the decision thereon and the reasons for decision. All the ingredients of Order 41 Rule 31 have been stated by the appellate court and the appellate court has decided the appeal after giving cogent and convincing reasons in this behalf.

5.4(E) The appellate court has specifically mentioned all points raised by the trial court and specifically reconsidered all the relevant points while giving reasons and, therefore, there is no violation of provisions of Order 41 Rule 31. The first appellate court had covered all important questions involved in the case. The appellate court has also considered the exact questions which arises in the appeal and determine the relevant issues in the judgment. The appellate court has noticed all necessary points for determination and gave findings on relevant issues formulated by the trial court and, therefore, the judgment is in accordance with Order 41 Rule 31 of the CPC. The appellate court has raised all points and cleared up pleadings focus and attention of the court and the parties and specifically stated the reasons and therefore the appellate court has complied with Order 41 Rule 31 of the CPC. The appellate court while reversing the judgment of the trial court touched the question of applicability of Section 12(3)(a) and Section 12(3)(b) of the Act and gave specific findings after considering the provisions of the Gujarat Education Cess Act and gave cogent and convincing reasons and, therefore, there is no violation of Order 41 Rule 31 of the CPC.

5.4(F) I have given thoughtful consideration to the rival contentions firstly the judgment reported in 7

Bombay Law Reporter 174 is a judgment of 1904 long before the amendment of the CPC made from time to time from 1908 to 1976. Even otherwise, the said judgment of the Bombay High Court is in peculiar facts and circumstances if the case. It did not interpret the provisions of Order 41 Rule 31 which is contained in the present code. It does not lay down absolute proposition that non-framing of point for determination would vitiate the judgment in all cases. On the contrary as can be seen from all subsequent judgment it is clearly laid down that every case is to be examined on the facts of the case even when proper points of determination are not framed by the appellate court. The said provision of Order 41 Rule 31 is a procedural aspect as to what the judgment of the appellate court should provide while deciding the appeal before him. It is not a substantial provision as provided in Sec.107 of CPC. There are four requirements in Rule 31 which the learned appellate Judge has to take into account while giving his judgment in appeal. One of the requirements is to frame points of determination which would necessarily mean the points required to be determined by him in appeal as may be canvassed or argued by the parties. He is not required to go beyond the contentions raised in appeal at the time of hearing. It is no doubt true that the points for determination as are pointed out in the judgment reported in para 8 of the judgment reported in 1985 Bom. page 98 are not sufficient compliance. However, it cannot be overlooked that when the Judge has framed proper points of determination which cannot be said to be vague or improper and when all the aspects are considered by giving reasons it cannot be said that there is non-compliance of the said Rule 31 as a whole since the said Rule 31 requires compliance of three other requirements. In other words, substantial compliance is necessary and if the other three requirements are satisfied the whole judgment cannot be said to have been vitiated only because a proper point for determination is not framed by the learned Judge. It is no doubt true as found by the Bombay High Court in both the above stated cases that proper attention is not paid by some appellate Judges to the importance of raising in clear terms the point for determination while deciding the appeal before them but it cannot be laid down as an absolute rule to invalidate the whole judgment necessitating re-hearing of the appeal after a long lapse of time.

5.4(G) I have also considered the judgment of the Apex Court in Madhukar case (supra) relied by the learned advocate for the appellant. In that case if one look to the facts of the case in Madhukar's case (supra), the

trial court gave findings that suit to be dismissed on the ground of limitation as well as on the ground of resjudicata. Against that judgment the trial court only raised two questions regarding relationship and declaration. The other issues were not considered by the High Court. In that context, the Apex Court has set aside the judgment of the High Court that judgment was not under Order 41 Rule 31 of the CPC. Therefore, Madhukar judgment depends upon the peculiar facts and circumstances of the case and therefore the said decision does not help to the learned advocate for the petitioner in this behalf. On the contrary, in this case the judgment of the appellate court reflects its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court and, therefore, the said decision of the appellate court is in consonance with the principle laid down by the Apex Court in the case of Santosh Hazari Vs. Purushottam Tiwari (dead) by legal representatives reported in 2001 AIR SCW 723 (para 15 of the said judgment).

6. I have considered the judgment of of the appellate court in this behalf. I have also considered the recent judgment of Bombay High Court in the case of Hari Sonar (supra), Full Bench Judgment of this Court in the case of Prabhashanker Shankerlal Joshi and others (supra), Bombay High Court judgment in the case of Mhasu Bhauji (supra), Smt.Anita M.Harretto (supra), Rajasthan High Court judgment in the case of Satya Prakash (supra), Madras High Court judgment in the case of S.Madasamy Thevar (supra), and also the judgment of Apex Court in the case of Jaywant S.Kulkarni (supra) and also the judgment of this Court in the case of Ismail Haji Mohammed Abrahani (supra) and Patel Valmik Himatlal and others (supra). The judgment of the Apex Court is in consonance with the principle laid down by these decisions and therefore there is no infirmity in this judgment.

6(A) I have considered the provisions of the CPC particularly definition of decree, definition of judgment, Section 99 and Section 107 of CPC and other judgments which I have been stated in this behalf. In view of overall scheme of CPC it appears that the learned appellate Judge has complied with Order 41 Rule 31 of the CPC in this behalf.

7. I have considered the facts and circumstances of

the case particularly provisions of Education Cess Act and provision of Rent Act. In my view, the learned Judge has given very cogent and convincing reasons and held that provisions of Section 12(3)(a) of the Rent Act are applicable as rent was not paid within one month from the date of service of notice and rent was due for more than six months from the date of service of the notice and there was no dispute about the standard rent was raised within one month from the date of service of notice. The learned Judge has given very cogent and convincing reasons to arrive at the said finding and therefore I do not see any reason to interfere with the order passed by the appellate court in this behalf and therefore the same is rejected with no order as to costs. The judgment and decree passed by the appellate court is confirmed. Rule is discharged.

7.1 Before I part with this judgment, I express my deep sense of gratitude to Senior Advocate Mr.S.M.Shah as well as Mr.P.V.Hathi and Mr.D.K.Mehta who have rendered very valuable assistance in this matter for resolving very complicated question of law arising in the Civil Revision Application and also help me deciding this old matter.

(K.M. Mehta, J.)

syed/